IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

CIVIL WRITS No. 2328 of 2004

GURDEEP SING & ORS.
V/S
BORD OF REVENUE & ORS.

Mr. HS SIDHU, for the appellant / petitioner

Date of Order : 2.9.2004

HON'BLE SHRI N P GUPTA,J.

ORDER

Heard learned counsel for the petitioner at length. It was submitted firstly that suit under Sec. 88 of the Rajasthan Tenancy Act could be maintained only by tenant or Khatedar. It is not the case of plaintiff that they were Khatedars, therefore, suit itself was not maintainable.

It is not in dispute that land was allotted on permanent basis to deceased Hari Singh in the year 1963. According to learned counsel, the said permanent allottees were having Khatedari rights on expiry of 5 years from the date of allotment and allottee seems to have died in 1975-76. By the time he died, I am of the view that he acquired Khatedari rights. In that view of the matter, when the plaintiffs claim their right by inheritance on account of death of Hari Singh, as they are the sons and daughters of Hari Singh, it cannot be said that they could not maintain the suit. It is then contended that in the suit, prayer has been made for setting aside the mutation, while mutation was appealable, limitation for filing appeal having expired, it attains finality, which could not be challenged by way of present suit. Suffice it to say that a look at plaint shows, that it was filed for declaration of Khatedari rights by inheritance, and for partition. Mutation has

been pleaded only as an event giving rise to the cause of plaintiff, as in the garb of that mutation, the petitioner had started obstructing them from entering in the land, or taking the crop. In that view of the matter, the suit cannot be said to be not maintainable, simply because an additional request has been made for cancellation of mutation.

Next submission made was, that Hari Singh died in the year 1975-76, though Will was made in the year 1966, the will came into effect after his death, and by that time, the prohibited period of 5 years had already expired,therefore, the bar as enacted under Sec. 13 could not be attracted.

In order to appreciate the submission, I may gainfully quote the provisions of Sec.13 of the Rajasthan Colonisation Act, 1954, as it existed at the relevant time, which reads as under:-

> "13. Transfer of rights- (1) No tenant shall transfer or charge his right or interest vested in him by or under this Act, without the consent in writing of the Collector by way of sale, exchange, gift, will, mortgage or in any manner otherwise than by exchange as permitted by Sec. 12, except to the State Government or except by way of mortgage, for the purpose of obtaining a loan for development of his holding from the State Government or a land development bank as defined in the Rajasthan Cooperative Societies Act, 1965 (Rajasthan Act 13 of 1965), or any schedule bank or any other institution notified by the State Government in that behalf in the Official Gazette, or sub-let the same for more than five years in the case of a tenant who has acquired Khatedari rights.
>
> (2) Any such transfer, sub-lease or charge made in contravention of sub-section (1) shall be void and if the transferee has obtained possession he shall be ejected under the orders of the Collector."

Thus from the perusal of the aforesaid it is clear that it prohibits the tenant from transferring or creating any charge on his right or interest vested by or under the Act, and such transfer or creation of charge was prohibited in any of the ways which included Will as well. Thus the provisions of Sec. 13 (1) clearly comprehended the Will to be one of the modes of transfer, and was prohibited. There is nothing in this section to show that the prohibition would at all depend upon the document, being operative or coming into effect, rather the prohibition was against the making of the transfer. In that view of the matter, since making of the Will itself was prohibited, simply because the testator survived for long time, the bar of Sec.13 cannot be said to be inapplicable.

Learned counsel next submitted, that effect of breach of provision of Sec. 13 is only to the effect that the Collector can initiate proceedings for cancellation of allotment, and simply because of the fact there is some breach of provisions of Sec. 13, thereby the plaintiffs do not get the right to file the present suit, claiming illegality in the Will. I am of the view that the Collector may have right to cancel the allotment on account of the violation of Sec. 13, but then if the Will is tained with the illegality, being the one prohibited by Sec. 13(1), it cannot confer any benefit/right on the petitioner, as transfer has been declared sub-section(2) itself, to be void. As such, it simply required to be ignored and the natural consequence is, that on the death of Hari Singh, his L.Rs. become entitled to inheritance and Will becomes meaningless.

The effect of making the Will has already been considered by the

Board of Revenue while dealing the judgment of this court reported in 1988 WLN,40, and it is not shown to me as to why this part of finding is not correct.

In this view of the matter, I do not find any sufficient ground to interfere in this petition. The same is, therefore, dismissed summarily.

(N P GUPTA),J.

/Srawat/